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Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, AND THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS

Amici collectively represent a large number of companies who engage in or facilitate commerce on the Internet. *Amici*, both as individual entities and as associations, share the goal of protecting children from harmful material online and recognize the need to make available mechanisms that do so.

When the government regulates speech based on content, however, it must demonstrate that it has chosen the least restrictive available alternative. In the view of *amici*, the government cannot make that demonstration in this case. As this Court recognized when striking down the precursor to the statute at issue here, "'currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for

their children will soon be widely available.'" *Reno v. ACLU*, 521 U.S. 844, 877 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)). Since that decision, the number and efficacy of the available user-based tools have increased dramatically. *Amici* have played an active role in developing and promoting these user-based tools, and submit this brief *amici curiae* to explain why the existence of these tools makes clear that the content-based restriction in the Child Online Protection Act ("COPA") is not the least restrictive means of protecting children from harmful material on the Internet.

INTEREST OF AMICI[1]

Amici are the Chamber of Commerce of the United States of America, the Internet Technology Association of America, and the Computer & Communications Industry Association.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses and organizations of every size, in every industry sector and in every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the American business community.

The Information Technology Association of America ("ITAA") provides global public policy, business networking,

[1]The parties have consented to the submission of this brief. Their letters of consent have been lodged with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici*, their members, or their counsel contributed money or services to the preparation or submission of this brief.

and national leadership to promote the continued rapid growth of the information technology industry. ITAA consists of over 500 direct corporate members throughout the United States.

The Computer & Communications Industry Association ("CCIA") is an international, nonprofit association of computer and communications firms. Small, medium and large in size, CCIA's members include equipment manufacturers, software developers, telecommunications and online service providers, re-sellers, systems integrators, third-party vendors and other related business ventures. CCIA's mission is to further its members' business interests by promoting open, barrier-free competition in the offering of computer and communications products and services worldwide. CCIA's motto is "Open Markets, Open Systems, Open Networks, and Full, Fair and Open Competition."

Many members of the *amici* and a large number of other leading companies in the Internet industry have worked to develop and promote user-based methods, including various types of technology, for protecting children from harmful material on the Internet. *Amici* believe that their experience educating the public about and promoting the use of parental control techniques, including technological tools, provides a perspective that may aid the Court's assessment of the legal and factual issues raised by the question of whether COPA is the least restrictive alternative to protect children from harmful material online.

INTRODUCTION

The Internet is a decentralized, self-maintained networking system that links computers and computer networks around the world, and the World Wide Web is a publishing forum

consisting of millions of individual Web sites that may contain text, images, illustrations, video or animation. The development of the Internet and the Web represents a remarkable advance in the ability of average persons to speak and listen to each other from virtually every corner of the globe. "It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country – indeed the world – has yet seen." *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996) (three-judge court) (Dalzell, J., concurring), *aff'd*, 521 U.S. 844 (1997). Unlike other media, the Internet provides "an easy and inexpensive way for a speaker to reach a large audience, potentially of millions." Pet. App. 56a. In cyberspace, "anyone can build a soap box out of web pages and speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined." *Id.* at 41a. In short, the range of information available on the Internet is "as diverse as human thought." *Id.* at 56a.

Another defining characteristic of this new medium is its ability to empower individual users to control their own access to information. To a greater extent than with any other medium, technology enables individuals to determine how much – or how little – of this "never-ending worldwide conversation" to allow into their homes. *See, e.g., ACLU v. Reno*, 929 F. Supp. at 883 (Dalzell, J., concurring).

The free flow of information that the Internet facilitates has spurred efforts toward political democratization and fostered commercial economic growth. Though the Internet is available only to a minority of the world's population today, Internet use is expected to rise rapidly during the next ten years, especially

in developing countries.[2] These positive developments have occurred precisely because the Internet allows users to choose the information they wish to obtain from the vast array of material available to them. As this ability to freely access information spreads across the globe, however, governments around the world are seeking to control the content that their citizens may access. A variety of countries have taken measures to censor or prevent their citizens from accessing material posted on the Internet. *See* Reporters Sans Frontiers, *Enemies of the Internet: Attempts to Block the Circulation of Information on the Internet: Report 2001* (2001). Some western countries have attempted to block racist, xenophobic and sexually explicit Internet content,[3] while authoritarian

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[2] *See* The World Bank Group, *Developing Countries Could See Fastest Growth in Over a Decade But Are Hurt by Trade Barriers in Rich Nations* (Dec. 5, 2000), http://wbln0018.worldbank.org.news/pressrelease.nsf?OpenDatabase&Start=349.

[3] A French court, for example, has ruled that Yahoo!, Inc., – a U.S. company based in California – violated French law by allowing Nazi memorabilia to be auctioned on its Web site. The court ordered Yahoo! to block French users from accessing any Nazi material on its site or face daily fines. *See Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 145 F. Supp. 2d 1168, 1171-72 (N.D. Cal. 2001) (describing litigation). Similarly, in December 2000, the German Federal Court of Justice ruled that Germany's legislation banning the glorification of the Nazis and the denial of the Holocaust applies to people who post content on the Web from outside the country, as long as the content is accessible to German Internet users. The decision upheld the conviction of an Australian Holocaust revisionist for insulting the memory of the dead by posting on an Australian Web site his belief that the Holocaust never occurred. *See* Ian DeFreitas, *Worldwide Web of Laws Threatens the Internet*, Times of London, Jan. 9, 2001 (2001 WL 4865394). And in January 2001, an Italian court held that Italy can enforce its libel laws against anyone who posts content on the Internet, even if the speakers are based in other countries. The ruling stemmed from a claim filed by an Israeli man living in Italy against a foreign Web site for slandering him in a report about a custody dispute. *See No*

regimes have resorted to even more extreme measures to limit their citizens' access to material online.

Censorship efforts such as these threaten the Internet's viability and vitality. At the same time, there is a growing recognition around the world – from the European Union to Singapore – that the most effective way to protect Internet users from undesired content is through the use of user-based tools that empower users to control the Internet content they receive.[4]

In the *Reno v. ACLU* decision in 1997, this Court rejected censorship of Internet speech, and by so doing set a clear example to the world as to the appropriately high level of legal protection afforded to speech on the Internet. That decision fostered the continued development and refinement of user-based tools to protect children and others online. In this case, the Court should reaffirm the principles of its original *Reno v. ACLU* decision, and should again set an example for the world. As this Court has recognized, if the Internet is truly to serve as a "'unique and wholly new medium of worldwide human communication'" that can make information available "'not just in Philadelphia, but also in Provo and Prague,'" *Reno v. ACLU*, 521 U.S. at 850, 854 (quoting *ACLU v. Reno*, 929 F. Supp. at 844), efforts to regulate or censor the Internet must be approached with extreme caution and adopted only if absolutely necessary. *Id.* at 849, 851, 854.

National Boundaries for Libel on the Internet, Italy. Cass., closed session, Nov. 17-Dec. 27, 2000, Judgment No. 4741, available at www.cdt.org/speech/international/001227italiandecision.pdf.

[4] *See* ICRAsafe Project, http://europa.eu.int/ISPO/iap/projects/icrasafe.html (describing European support for user empowerment tools); http://www.pagi.org.sg/about.htm (describing industry led user-empowerment efforts in Singapore).

This is not to suggest that it is always inappropriate or unconstitutional for the United States government to act with respect to speech on the Internet. *Amici* do contend, however, that where, as here, a statute directly regulates lawful content on the Internet, that statute must be carefully scrutinized to determine whether alternatives exist that would be equally effective in protecting children from harmful material without the need for governmental censorship. As *amici* explain below, in our view such alternatives exist. Accordingly, *amici* urge the Court to conclude, as did the District Court and the Third Circuit, that COPA unnecessarily burdens speech on the Internet.

BACKGROUND

As participants in the growth and development of the Internet, *amici* recognize that parents have a genuine and legitimate need for assurance that their children will be protected from encountering online material that their families deem inappropriate for them. In response to this important need, many of the leading companies in the Internet industry have developed and promoted user-based technology tools that empower parents to control the material their children view on the Internet.

The volume and variety of tools developed by the private sector to empower Internet users has increased dramatically since the courts first considered such technology as an alternative to mandatory content restrictions. Whereas the district court noted in the 1996 CDA challenge that filtering software had been on the market for "over a year," citing about a dozen available choices, *ACLU v. Reno*, 929 F. Supp. at 839-42, testimony in this case two years later identified about 50

available types of blocking and filtering software and services. *See* Tr. 185.[5] Since then, the number of available technology tools has continued to grow. Today, the number of "tools for families" listed in one online resource stands at 146.[6]

The Internet industry and non-profit community have made strenuous and concerted efforts to raise public awareness of these user-end tools and to ensure that they are widely available to families at relatively low cost. For example, "GetNetWise," an industry-wide children's online safety project, works to ensure that parents have a user-friendly and easily accessible resource that provides information on, and access to, filtering and blocking software. Launched in 1999, GetNetWise includes: (1) educational information about childrens' online safety, (2) information about recognizing and reporting online crimes against children, (3) a searchable database featuring the wide range of technology tools families may use to help protect children online, and (4) collections of Web sites for kids.[7] The goal of GetNetWise is to ensure that parents can easily find information about self-help methods for protecting their children on the Internet. It is now estimated that over 90 percent of Internet users pass through a site from which the user can access GetNetWise with one click of the mouse.[8]

This wide variety of tools differs in terms of how each works, the types of materials each screens, and how

[5]"Tr." refers to Larry Magid's testimony at the January 20, 1999 preliminary injunction hearing.

[6]*See* http://www.getnetwise.org.

[7]*See id.*

[8]*See* http://www.getnetwise.org/pr12-19-00.shtml.

restrictively each does so. Their versatility helps ensure that individual households can tailor their preferences for accessing online materials based on the editorial/filtering policies of the product that most closely approximates their values. Moreover, the vast majority of Internet service providers offer access to these blocking and filtering software to their subscribers – often for free. Thus, parents have easy and inexpensive access to tools that allow them to protect their children from material that the parents deem harmful. These tools include:

Filtering and blocking software. This technology enables parents to install software on the family computer that blocks access to sites deemed by the parents to be inappropriate for their children. *See* Tr. 164. Parents can choose from a wide variety of filtering approaches to find a system that suits their family needs. *See id.* at 164-65.[9] For example, some filtering companies ask experts, parents and teachers to rate and classify sites, while others identify inappropriate content by searching for key words. A third group of filtering software combines these two approaches. The filtering software products on the market today can be customized to suit the individual preferences of each family. For example, parents have the ability to adjust settings according to the age of their children, the time of day their children most often use the Internet, and the number of family members that share the same terminal. Families can also enforce their own values – either more or less restrictively – by defining the particular types of content they

[9]A wide range of filtering and blocking software is available, including, for example, Internet Guard Dog, http://www.mcafee-at-home.com/products/internet-guard-dog/; Cyberpatrol (for Home) by Surfcontrol, http://www.surfcontrol.com/products/cyberpatrol_for_home/product_overview/index.html; Cybersitter, http://www.cybersitter.com; SOS KidProof, http://www.soskidproof.com;andNetNanny, http://www.netnanny.com/home/home.asp.

wish to screen from their children (*e.g.*, violent material, hate speech, sexually explicit images).

Filtered Internet Service Providers ("ISP"). Parents who prefer not to install software on their computers can select an "ISP" that pre-screens content before it reaches the home computer. Some parents choose this option out of concern that their children are so computer-savvy that they will be able to thwart a program installed on the home computer. The Mayberry USA ISP, for example, provides nationwide filtered Internet service that blocks sites deemed pornographic even if specifically requested by a user. America Online ("AOL") offers a similar option to users of its service. When a parent creates a "Screen Name" for a child, the parent is prompted to set age-appropriate "Parental Controls," which (at no additional charge) may include restrictions on use of e-mail and chat functions.[10] *See* Tr. at 153-62. In addition, many ISPs provide users with discounted access to filtering and blocking software.

Filtered Internet Browsers and Search Engines. Widely used Internet browsers and search engines today provide customers with the option of screening out undesired content. When a search result produces a site identified as inappropriate, the site will be blocked or suppressed. Many filtered search engines and browsers are available free of charge, and can often be found as companions to popular search engines. For example, Kids CyberHighway functions as an attachment to the Microsoft Internet Explorer. The AltaVista search engine offers an advertising-revenue supported "Search Service," and

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[10]*See* http://www.aol.com/info/parentcontrol.html. Filtered ISPs include, for example, Integrity Online, http://www.integrity.com; Mayberry USA ISP, http://www.mbusa.net; FamilyClick, http://www.familyclick.com/welcome.cfm.

AOL provides a search engine, "NetFind Kids Only," that links only to sites considered safe for children.[11]

Self-Contained Online Communities. To ensure that their children access only a limited number of pre-approved sites, parents can employ products that use editorial guidelines to limit children's Internet exposure to educational and enriching Web sites. These tools create a closed universe of Web sites.[12]

Supervisory and Monitoring Tools. Technology is available today that enables parents to monitor their children's use of the Internet, as well as to restrict their use by time of day, or when a parent is present.[13] Some of these tools can be configured to operate with or without the child's knowledge, and with or without warning messages or system shutdowns for violations of pre-set rules for Internet use. Additionally, some may apply to Web sites, e-mail, chat, newsgroups, or other

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[11]Many browsers and search engines enable parents to filter undesired content, including, for example, Yahooligans!, http://www.yahooligans.com/parents/; Google's Safesearch, http://www.google.com/preferences; Lycos' Parental Control, http://searchguard.lycos.com; Ask Jeeves' Ask Jeeves Kids, http://www.ajkids.com; and AOL NetFind Kids Only, http://www.aol.com/netfind/kids/funsites.html. Some browsers are designed especially for children. For example, ChiBrow, available free from ChildrenBrowser.com, gives children easy access to more than 300 child-friendly sites, which are chosen based on guidelines posted on the site. Additional children's browsers are listed at http://www.yahooligans.com/parents/.

[12]*See, e.g.*, The Children's Internet, http://www.twodog.com; eKids Internet, http://www.ekidsinternet.com.

[13]*See, e.g.*, Spectator, http://www.spectorsoft.com; Computer Cop, http://www.computercop.com.

Internet fora. The two major Internet browsers, Internet Explorer and Netscape Navigator, have "caches" that list sites recently visited, while other products add another key feature – a "lock" to prevent erasure of the list of visited sites. *See* Tr. at 169-71.

Child-Oriented Internet Sites or "Greenspaces." Parents who prefer to guide their children to child-oriented sites without actually imposing technological barriers to other sites can choose from child-appropriate sites compiled by libraries and educators, such as "Kids Connect Favorite Web Sites" selected by school librarians for K-12 students, or the American Library Association's "700+" list of more than seven hundred child-friendly Web sites.[14]

As explained below, *amici* believe that the existence of these tools – and the government's ability to promote and foster their availability and use – presents a superior alternative to content regulation. These tools are the most effective way to protect children online, and they do so without imposing the crippling burdens on protected speech associated with COPA.

SUMMARY OF ARGUMENT

It is well settled that the government has a compelling interest in protecting children from harmful material – an interest *amici* share. *See, e.g., Reno v. ACLU*, 521 U.S. at 875. But "the mere fact that a statutory regulation of speech was

[14]Kids Connect Favorite Web Sites, http://www.ala.org/ICONN/kcfavorites.html; ALA list of "770+Great Sites," http://www.ala.org/parentspage/greatsites/. Similar sites include NetMom's Hot 100 Internet Sites for Kids, http://www.netmom.com/ikyp/samples/hotlist.html; and Cyberangel's CyberMoms Approved Links, http://www.cyberangels.org/cast/.

enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity." *Id.* Here, a key issue is whether the government has chosen the *least restrictive means* to achieve its objective of protecting children from "harmful to minors" material online.

In the view of *amici*, the government cannot show that it has met this burden. First, the government cannot demonstrate that COPA's content-based restriction is the most effective way to protect children from harmful material online. By its own terms, COPA does not protect children from all such material; it will not, for example, prevent children from accessing a wide variety of material that parents may prefer to exclude – including sexually explicit material found on non-commercial U.S. Web sites or commercial Web sites located overseas, violent material, or material expressing hatred toward groups or individuals. By contrast, the user-based tools described above allow parents to restrict access to such content – and to tailor such restrictions to the parents' view of what is appropriate, taking into account the child's age and level of maturity.

COPA's limited effectiveness is even more troubling in light of its restrictiveness. By definition, the speech COPA addresses is constitutionally protected as to adults. Because COPA imposes criminal penalties, it will unquestionably chill speech – Web site operators afraid of prosecution will either remove material that they fear might be deemed harmful to minors by any community, or place such material behind screens that can be lifted only by a user with a credit card or adult verification number. Even if such material is placed behind such screens rather than removed from the Internet altogether, the burden on speech will be significant – there is no

question that access to speech will be deterred, as adults will hesitate to provide such personal information to a Web site or adult-check company online. In contrast, user-based tools allow adults free, anonymous access to material that is lawful for adults, while preventing such access by minors.[15]

ARGUMENT

I. COPA IS A CONTENT-BASED REGULATION OF SPEECH SUBJECT TO STRICT SCRUTINY.

As the government concedes, COPA is subject to strict scrutiny because it regulates speech based on its content. *See* Brief for the Petitioner ("Pet. Br.") at 23. For content-based restrictions of speech such as COPA, "the usual presumption of constitutionality afforded congressional enactments is reversed." *United States v. Playboy Entm't Group Inc.*, 529 U.S. 803, 817 (2000). In such cases, regulations are "presumptively *invalid*" and the "the Government bears the burden to rebut that presumption." *Id.* (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (emphasis added)).[16]

[15] The District Court recognized this in concluding that the government is unlikely to be able to demonstrate that COPA survives strict scrutiny: "The record before the Court reveals that blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators. Such a factual conclusion is at least some evidence that COPA does not employ the least restrictive means." Pet. App. 94a.

[16] It is irrelevant that COPA does not impose a complete ban on speech. Content-based burdens on protected speech are subject to strict scrutiny in the same way that content-based bans are. *See Playboy Entm't Group*, 529 U.S. at 812 ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning

In order to rebut the presumption of invalidity and survive strict scrutiny, the government must first demonstrate that COPA is designed to further a compelling state interest. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). But that alone is not sufficient – the government must also demonstrate that it has chosen the least restrictive means to achieve its objectives. *Id.* ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.").

In order to demonstrate that a regulation satisfies the least restrictive alternative test, the government must show that its chosen method of regulation is effective, and that alternatives that do not burden speech are not equally effective. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980) ("[T]he restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."). Thus, "[w]hen a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy Entm't Group*, 529 U.S. at 816. If other effective alternatives are available, the government must show that its chosen alternative is the least burdensome of protected speech. *See Elrod v. Burns*, 427 U.S. 347, 363 (1976). Thus, the government's interest in protecting children does not justify an "unnecessarily broad suppression of speech addressed to adults," and the free speech rights of adults may not be diminished to allow them access only to material acceptable for children. *Reno v. ACLU*, 521 U.S. at 875 (citations omitted). As this Court explained in *Reno v. ACLU*, the "burden on adult

speech is but a matter of degree.").

speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Id.* at 874.

II. COPA FAILS STRICT SCRUTINY BECAUSE IT IS NOT THE LEAST RESTRICTIVE MEANS OF ACHIEVING THE GOVERNMENT'S OBJECTIVES.

A. User-Based Tools Are More Effective Than COPA in Serving the Government's Purpose.

1. The purpose of COPA is to limit the access of minors to harmful material on the World Wide Web. *See* H.R. Rep. No. 105-775 at 5-6 (1998). There can be no serious dispute, however, that COPA cannot achieve that goal effectively. First, COPA applies only to Web sites originating in this country, and thus does not even purport to prevent children from viewing material that originates overseas. The Internet, however, is a global network that connects users to Web sites that originate from countries around the world. A Web site that originates in any other country is just as accessible to a user in the United States as a Web site originating in this country.

Although precise figures are unavailable, it has been estimated that approximately forty percent of the content on the Internet originates outside the United States. *See* Pet. App. 62a. Thus, even if COPA rendered every Web site containing adult material and originating in the United States unavailable to children, children would still have ready access to a plethora of material on Web sites originating in other countries. *See* COPA Commission, *Final Report of the COPA Commission*, Oct. 20, 2000, at 13 ("Material published on the Internet may originate anywhere, presenting challenges to the application of the law of any single jurisdiction. Methods for protecting

children in the U.S. must take into account this global nature of the Internet.").[17] As Judge Stuart Dalzell noted, "[p]ornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the [law]." 929 F. Supp. at 882-83 (Dalzell, J., concurring).

Nor does COPA limit children's access to non-commercial Web sites containing adult material, or to non-Web Internet material, including thousands of newsgroups and chat communications, that contain material that might be deemed harmful to minors. *See* H.R. Rep. No. 105-775 at 12 ("H.R. 3783 does not apply to content distributed through other aspects of the Internet such as one-to-one messaging (e-mail), one-to-many messaging (list-serv), distributed message databases (USENET newsgroups); real time communications (Internet relay chat); real time remote utilization (telnet) or remote information retrieval other than the World Wide Web (ftp and gopher)."). These sources of information constitute a substantial portion of Internet content. As the District Court concluded, COPA's failure to limit children's access to these materials undermines COPA's effectiveness: "[T]his Court's finding that minors may be able to gain access to harmful to minors materials on foreign Web sites, non-commercial sites, and online via protocols other than http demonstrates the problems this statute has with efficaciously meeting its goal." Pet. App. 93a; *see also Final Report of the COPA Commission,*

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[17] *See* http://www.copacommission.org/report/.

at 27 ("This approach is not effective at blocking access to chat, newsgroups, or instant messaging.").[18]

2. COPA's content controls are particularly unnecessary given that Congress has already taken steps to promote less restrictive alternatives. In a section of COPA not challenged in this litigation, Congress required Internet Service Providers to inform their new customers "that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors." *See* 47 U.S.C. § 230(d). By mandating this notification, Congress ensured that parents who are new to the Internet will be informed of the options available to them to protect their children online.

As explained above, *supra* at 8, well over 100 "tools for families" exist that allow parents to control the material to which their children have access. These user-based solutions allow parents to protect children from harmful material on Web sites originating overseas, on non-commercial Web sites, and in non-Web Internet formats, such as electronic mail, newsgroups or chat rooms. *See* Pet. App. 82a ("Blocking and filtering software will block minors from accessing harmful to minors materials posted on foreign Web sites, non-profit Web sites, and newsgroups, chat, and other materials that utilize a protocol other than HTTP.") (citing testimony of government expert Dan Olsen); *see also Final Report of the COPA Commission*, at 21 (observing that client-side filtering "can be

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[18]The fact that COPA does not materially advance the government's stated purpose alone renders it constitutionally suspect. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188-93 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 396 (1984); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983).

effective in directly blocking access to global harmful to minors content on the Web, in newsgroups, in email and in chat rooms"). Moreover, these tools are nuanced, allowing parents to decide what type of material is harmful based on the age of their children and their own family's values. These tools range from filtered ISPs and search engines that do not allow access to certain designated sites, to filtering and blocking software that screens based on parameters set by parents, to tools providing guidance on sites compiled by libraries and educators that have been deemed appropriate for various age groups. These tools may be used alone, or may be used in conjunction with one another to ensure that children have access only to that information their parents deem appropriate.

By requiring that parents be notified of the existence of these tools, Congress has already implemented an alternative that is more effective at accomplishing Congress' stated goal than is the restriction at issue here. This Court has routinely struck down content regulation in closely analogous circumstances, concluding that the existence of such "market-based solutions" and "technological approach[es] to controlling minor's access to [sexually oriented] messages" demonstrates that the content regulation adopted by the government is not the least restrictive alternative. *See, e.g., Playboy Entm't Group*, 529 U.S. at 814-15, 821; *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 758-59 (1996); *Sable Communications*, 492 U.S. at 130-31.[19]

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[19]COPA cannot be defended on the ground that parents may not implement these tools even if they are aware of their existence. As this Court has indicated, a voluntary measure cannot be assumed to be ineffective because it "requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act."

3. A special Commission established by Congress in COPA ("the COPA Commission") reached essentially the same conclusions with respect to COPA's effectiveness. The COPA Commission was established to study "methods to help reduce access by minors to material that is harmful to minors on the Internet." *See* 47 U.S.C. § 231, note.[20] The Commission, which was comprised of eighteen commissioners from government, industry and advocacy groups, representing a wide variety of political affiliations, evaluated and rated protective technologies based upon various factors including their effectiveness and implications for First Amendment values.

The Commission's conclusions are of particular significance here. First, the Commission found that user-side filtering and blocking technologies are more effective (and less restrictive of First Amendment values) than age verification systems based on credit cards and age verification systems based on independently issued identification passwords – the methods identified in COPA as affirmative defenses to prosecution. *See Final Report of the COPA Commission*, at 8, 21, 25, 27. The report applauded the use of "voluntary methods

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Playboy Entm't Group, 529 U.S. at 824; *see also Denver Area*, 518 U.S. at 758-59.

[20]In essence, the Commission's study, which was undertaken after Congress passed COPA, served as a substitute for congressional findings. Congress passed COPA without creating the detailed factual record constitutionally required to support its claim that COPA is the most narrowly tailored means to achieve its intended ends, and without adequately considering less restrictive approaches. The Senate held no hearings on COPA, and the House Commerce Committee conducted only a single hearing, mere weeks before the passage of COPA, as part of an Omnibus appropriations bill. The COPA Commission's report therefore is arguably the most thorough and searching analysis of the issues related to COPA undertaken at the behest of Congress.

and technologies to protect children," noting that, "coupled with information to make these methods understandable and useful, these voluntary approaches provide powerful technologies for families." *Id.* at 39.

Second, the Commission endorsed "consumer empowerment" as an essential aspect of protecting children in a global, decentralized network like the Internet. *Id.* at 39. While acknowledging that "no single technology or method will effectively protect children from harmful material online," the Commission made clear that the effort to protect children cannot depend upon new laws that contract the scope of available speech. *Id.* at 9. Among the approaches considered by the Commission were the many legislative options, including COPA, which have been proposed to control Internet content. The Commission concluded that the protections afforded by COPA would be fundamentally underinclusive, given COPA's inability to reach inappropriate material originating from abroad. *Id.* at 11, 13, 25, 39.

In short, the COPA Commission largely concurred with the views of *amici*. The effectiveness of COPA itself is severely limited. In contrast, user-based tools, coupled with other actions such as a campaign to educate parents and rigorous enforcement of existing laws, are the most effective way to protect children from online material that may be harmful.

B. User-Based Tools Are Less Restrictive Than COPA of Constitutionally Protected Speech.

1. Given the existence of other regulatory options that are at least as effective as COPA – and, indeed, are more effective – the government cannot meet its burden of demonstrating that it chose the least restrictive alternative if those options burden

speech to a lesser degree than does COPA. There is no question that that is the case. "In order to deny minors access to potentially harmful speech," COPA, like the Communications Decency Act, "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Reno v. ACLU*, 521 U.S. at 874.

a. First, by threatening speakers on the Internet with criminal sanctions, including up to $50,000 a day for each violation, COPA will have a direct impact on the content of lawful speech on the Web. To guard against potential liability under COPA, speakers who wish to communicate material that is entirely lawful as to adults will almost certainly eliminate content on their Web sites that could be deemed harmful to minors. Alternatively, Web site operators may place such speech behind costly screening devices. *See, e.g.*, Pet. App. 79a-80a; *see also Final Report of the COPA Commission*, at 25-26 (concluding that age verification system based on credit cards "imposes high costs on publishers" and that "[a]dverse impacts on First Amendment values result from cost to publishers"). In either case, "Web site operators and content providers may feel an economic disincentive to engage in communications that are or may be considered to be harmful to minors and thus, may self-censor the content of their sites." Pet. App. 89a. Such economic disincentives plainly burden protected speech. *See, e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975) (invalidating statute where speaker was "faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either

restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable").

The government attempts to discount the burden COPA imposes on speakers, asserting that content providers will not feel the need either to remove speech or to place it behind adult verification screens based on what might be deemed harmful to minors in the most restrictive community in the nation. In making this assertion, the government argues that technology exists that allows Web sites to determine the geographical location of the user. *See* Pet. Br. at 33-34.

As an initial matter, the government's assertions regarding the state of technology are flatly contradicted by the record in this case. Both the District Court and the Third Circuit concluded that Web businesses cannot screen users based on their geographic location. *See* Pet. App. 62a; *see also* Pet. App. 24a, 35a (observing that "Web publishers are currently without the ability to control the geographic scope of the recipients of their communications"). Those findings are consistent with this Court's decision in *Reno v. ACLU*, in which this Court concluded that "'[o]nce a provider posts its content on the Internet, it cannot prevent that content from entering any community.'" 521 U.S. at 853 (quoting district court).

This observation remains true today. Despite continuing advances in Internet technology, effective geographic filtering based on the state in which a Web user is located is not currently technologically feasible. Although the government cites an extra-record law journal article to support its point, *see* Pet. Br. at 34 n.3, even that article does not support the conclusion that Web publishers can effectively screen users using geographic identification technology. Indeed, the article

concludes that no companies currently provide geographical personal identification numbers via credit cards, that geographic identification technology is currently being developed but that it is "significantly more expensive" than age identification technology and "less accurate," and that it "can presently be defeated by Internet anonymizers, remote sessions via Telnet, and remote dial-up connections." *See* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 810-11 (2001). Although the article is optimistic about the development of geographic identification technology in the future, it concedes that "this technology is in flux, and nothing in our analysis turns on the precise accuracy of this information." *Id.* at 810 n.107.[21]

The government also hypothesizes that a Web business could require people seeking access to a Web site to provide their names and addresses in order to receive passwords, and that the business could "then mail passwords to the addresses provided at registration, limiting such mailing to the geographic areas of its choice." Pet. Br. at 34 n.3. In this way, the government suggests, a Web site could tailor its content to the various community standards of its users. In the view of *amici*, however, any such system would be unworkable. At most, a company could obtain the bricks-and-mortar *mailing address*

[21]The government also cites a French case involving Yahoo!, Inc. suggesting that the company is capable of blocking access from France to its auction sites. *See* Pet. Br. at 34 n.3. This reference is inaccurate. The record in the French case reveals substantial disagreement among the panel of experts regarding the state of technology and even the French court recognized that Yahoo! would have to ask users where they were located in order to determine geographical location. Yahoo! itself has consistently maintained that it is unable to screen geographically, and has sought declaratory relief from the French Court's judgment.

of a potential Web site user. That, however, would not identify the geographic location from which the user was accessing the Web. Thus, for example, a potential Web site user might provide a mailing address in New York and receive an "adult" password based on that address, but use the password at a computer terminal in Utah. Under the government's hypothetical system, a Web site operator would apply New York's community standard when that user accessed the site, even though the user was accessing the site in Utah, in violation of Utah's community standards. And, of course, in addition to being unworkable, such a system would impose enormous costs on Web sites forced to alter content, state-by-state, based on geographical locations associated with individual adult identification numbers.

This is not to say that technology will never be developed to allow Web sites to identify, at least roughly, the geographic location of some Web users. But such technology will certainly not be costless or comprehensive. The companies that are currently developing such technology will not likely provide it free of charge, and the expense associated with purchasing and implementing such technology may well be quite substantial (entirely apart from the potentially enormous expense of reviewing online content to comply with the standards of hundreds or thousands of local communities). Because of the nature of the Internet, any such technology will not likely be highly accurate or universal. Moreover, users will be able to circumvent location technology; indeed, already today commercial products are offered that, among other things, allow users to defeat location tracking. *See, e.g.*, http://www.freedom.net/info/index.html. For all of these reasons, even if location tracking technology were to become widely available, content providers would be unlikely to rely on it in the face of onerous criminal sanctions, and would instead

continue to place behind a screen all material that the most restrictive community might deem harmful to minors. *Amici* believe that a requirement to use such location technology would be burdensome, and would effectively chill the speech of many online publishers.

b. In addition to burdening the free speech rights of speakers on the Internet, COPA also burdens the protected First Amendment rights of adult Internet *users*. There is no question that, pursuant to COPA, speech that is protected as to adults will nonetheless be placed behind screens. Web users will be deterred from accessing Web sites if Web site operators are required to employ COPA's credit card or adult identification access code affirmative defenses (whether or not the Web site operator can determine the community in which the user is located). *See* Pet. App. 89a-90a As the record in this case amply demonstrates, users are often unwilling to provide identifying information such as a credit card number or a personal identification number to gain access to Web sites. *See id.* at 70a; *see also Reno v. ACLU*, 521 U.S. at 857 n.23.

In fact, as recent studies indicate, although Americans are concerned about children's access to pornography online, they are even more deeply concerned about online privacy: "[W]hen asked to describe the top three things that concern them about the Internet, nearly two thirds of all respondents (65 percent) mention something about the privacy of personal information. Another 29 percent cite pornography and the potential for children to access adult material on-line." Markle Foundation, *Toward a Framework for Internet Accountability*, at 15 (2001); *see also* Federal Trade Commission, *Privacy Online: A Report to Congress*, at 3 (1998) ("Clearly, consumers care deeply about the privacy and security of their personal

information in the online environment and are looking for greater protections.").

Although the government asserts that COPA imposes no greater burden on adult speech than laws requiring pornographic magazines to be placed behind "blinder racks" in stores, *see* Pet. Br. at 17-18, 29-31, that is plainly not the case. An adult who seeks to read a magazine that has been placed behind a blinder rack can reach behind the blinder and retrieve the magazine without revealing any identifying information. If the adult chooses to purchase the magazine with cash, no record whatsoever is maintained of the transaction. By contrast, because COPA requires an Internet user to provide personally identifying information online before material can even be accessed, in each and every instance a record containing personally identifying information will be created and maintained. Users will almost certainly be inhibited from accessing a Web site out of concerns that their identity and the fact that a particular site was accessed will be recorded. *See, e.g., Privacy Online: A Report to Congress*, at 3 (noting that "a substantial number of online consumers would rather forego information or products available through the Web than provide a Web site personal information without knowing what the site's information practices are") (footnote omitted); *accord Final Report of the COPA Commission*, at 25-27 (noting that a Web site that conditions entry on users' provision of credit card numbers or adult identification passwords "poses privacy risks"). Here, those concerns will be particularly acute, because the relevant Web sites may contain sensitive or potentially embarrassing content.

The First Amendment protects against inhibiting speech in this fashion. *See Denver Area*, 518 U.S. at 754-55. As this Court has explained, "[a]nonymity is a shield from the tyranny

of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (citation omitted). The fact that the speech may be sexual in nature, and even offensive to some sensibilities, cannot justify suppressing it. *See Reno v. ACLU*, 521 U.S. at 874-75; *Playboy Entm't Group*, 529 U.S. at 814.

2. Voluntary adoption of user-based technologies to protect children, by contrast, does not restrict adult access to constitutionally protected speech. First, parental controls on children's access to the Internet do not inhibit Web *speakers* from providing Web content that is lawful as to adults. Speakers neither risk criminal liability nor experience economic disincentives for engaging in protected speech. Nor do parental controls inhibit Web *users* from accessing protected content. Adults wishing to access constitutionally protected material are not dissuaded from doing so by the privacy concerns implicated by the use of credit cards or adult verification passwords. Instead, user-based technologies enable parents to screen information without revealing personal information to Web sites. Adults continue to enjoy unfettered access to lawful information, while parents are able to protect their children from information they deem potentially harmful to their children.

The Congressional record does not suggest otherwise. Indeed, far from demonstrating that it chose COPA's content-based restriction because it believed it was the *least*-restrictive alternative, the legislative history demonstrates the opposite. The House Report indicates that Congress rejected reliance on user-based tools because "[n]o single company has complete

control over the access points to the Internet or is responsible for all the content." H.R. Rep. No. 105-775 at 17. The legislative history thus demonstrates that Congress augmented user empowerment tools with content controls not because such tools are ineffective, but because they allow *too much* individual choice over Internet content. Such a conclusion – like the argument that the Web must be regulated because it allows "*too much* speech" – is "profoundly repugnant to First Amendment principles." *ACLU v. Reno*, 929 F. Supp. at 881 (Dalzell, J., concurring). As this Court recently emphasized:

> The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.

Playboy Entm't Group, 529 U.S. at 818.

3. Indeed, the COPA Commission itself agreed that user-based tools are less burdensome of protected speech than the kinds of content restrictions required by COPA. According to the Commission's report, age verification systems based on credit cards and adult identification passwords will have a significantly greater adverse effect on First Amendment values and privacy than user-based filtering and blocking technologies. *See Final Report of the COPA Commission*, at 8, 19-22, 25-27. Thus, even the body established by Congress to study methods to protect children from harmful material online concluded that

the methods identified in COPA as affirmative defenses are more restrictive of protected speech than user-based tools.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the decision below.

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